

TJAGSA Practice Note

Faculty, The Judge Advocate General's School

Legal Assistance Note

Soldiers' and Sailors' Civil Relief Act Now Applicable to the National Guard . . . Sort Of

The Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA),¹ as amended, provides a number of protections and benefits for active duty service members.² For example, the SSCRA provides for stays or continuances of civil proceedings when a service member's military service materially affects his ability to participate in litigation.³ It provides for reductions of interest rates on pre-service loans to an annual rate of six percent when the service member's military service materially affects his ability to pay interest in excess of six percent.⁴ The law's coverage usually begins "on the date on which the person enters active service and [ends] on the date of the person's release from active service or death while in active service."⁵

To take advantage of the SSCRA, a service member previously had to be serving on federal active duty under Title 10 of the U.S. Code.⁶ A recent change amends the law and expands its coverage to certain Guardsmen who are not serving in a Title 10 status.⁷ Legal assistance attorneys and others must understand the capacities or statuses in which Guardsmen serve to help their clients take advantage of the SSCRA.

Although discussions of the National Guard's (NG) structure and the status of its members can be "complicated by the murky and mystical duality of the National Guard system,"⁸ Guardsmen can perform duty in one of three statuses: state active duty, Title 32, or Title 10 status. To understand why this is the case, it is helpful to keep in mind that the NG is an integral component of the Army and Air Force,⁹ but it is first and foremost subject to the command and control of individual state governors.¹⁰ First, state governors can (and routinely do) acti-

1. 50 U.S.C. app. §§ 501-594 (2000).

2. Although the SSCRA is obviously written for the benefit of soldiers and sailors, it also applies to "members of . . . the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy." *Id.* § 511(1).

3. *Id.* § 521. Other provisions offer similar types of protection. *See, e.g., id.* § 520 (conferring protections related to default judgments); *id.* § 522 (allowing for stays of contractual fines); *id.* § 523 (allowing for stays of judgments, attachments, and garnishments); *id.* § 525 (allowing for possible delays in the tolling of the statute of limitations).

4. *Id.* § 526. The SSCRA also provides other important legal protections. *See, e.g., id.* § 530 (conferring protections against eviction); § 531 (allowing for relief from obligations in installment contracts); *id.* § 532 (conferring protections against mortgage foreclosure); *id.* § 534 (conferring protections against lease termination); *see also* Lieutenant Colin A. Kisor, *Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Civil Relief Act*, 48 NAVAL L. REV. 161, 178-79 (2001) (discussing the six-percent interest cap).

5. 50 U.S.C. app. § 511(2). Coverage for most of the important protections is extended on the front end of duty to "any member of a reserve component of the Armed Forces who is ordered to report for military service . . . [from] the date of receipt of such order." *Id.* § 516.

6. *See id.* § 511(1) ("The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to . . ."). Under ordinary circumstances, members of the armed forces enter active duty through enlistment or appointment. *See* 10 U.S.C. §§ 505, 532 (enlistments and officer appointments, respectively); *see also id.* § 651 (governing service obligations). Members of the Reserve Component (RC) may be brought to active duty under several statutory provisions. *See generally id.* § 12301(a) (authorizing the activation of the entire RC in the event of a war or national emergency, for the duration of the crisis plus six months); *id.* § 12302 (authorizing the activation of up to one million members of the Ready Reserve for up to twenty-four months following a presidential declaration of national emergency); *id.* § 12304 (authorizing the activation of up to 200,000 members of the Selected Reserve for up to 270 days "to augment the active forces for any operational mission"). The President recently called large numbers of Guardsmen to active duty, consistent with these authorities. *See* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001) ("Declaration of National Emergency by Reason of Certain Terrorist Attacks"); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (authorizing the activation of Ready Reserve to active duty in response to terrorist attacks against the United States).

7. 50 U.S.C. § 511(1) (LEXIS 2003). The relevant portion of the SSCRA is as follows:

The term "person in military service," the term "persons in military service," and the term "persons in the military service of the United States," as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy, and *all members of the National Guard on service described in the following sentence.* The term "military service," as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service, and, *in the case of a member of the National Guard, shall include service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.* The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave or other lawful cause.

Id. (emphasis added).

vate Guardsmen into state active duty to provide manpower and other resources to assist during natural disasters and other emergencies.¹¹ Next, governors can call these forces to duty under Title 32 of the United States Code. The ordinary training cycle, consisting of one weekend per month and a two-week annual training cycle, is an example of this duty.¹² In this status, Guardsmen remain under the command and control of their state authorities, but they receive federal funding.¹³ Finally, the NG may be mobilized and called to federal active duty under Title 10.¹⁴

Again, before the recent amendment, the SSCRA's benefits and protections did not apply to Guardsmen unless they were on active federal duty under Title 10.¹⁵ In other words, the SSCRA was inapplicable to Guardsmen if they were performing duty under Title 32 or if the duty was state active duty. The inequity of this situation came into focus after the hijackings

and terrorist attacks of 11 September 2001. In response to those attacks, many Guardsmen were ordered to active duty under Title 32 to provide additional security at major airports throughout the country.¹⁶ Therefore, they did not receive SSCRA protections while on active duty, despite the similarities this duty had to active duty performed by other members of the armed forces. In response, Congress drafted section 305 of the Veterans Benefits Improvement Act of 2002.¹⁷ This Act, signed by the President on 6 December 2002, extends the SSCRA's reach to certain situations in which Guardsmen are brought to active duty under Title 32. It amends the SSCRA to include service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by federal funds.¹⁸

8. *Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001). Statutorily, "[t]he term 'National Guard' means the Army National Guard and the Air National Guard." 10 U.S.C. § 101(c)(1) (2000). The statutory definition is as follows:

"Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution;

(C) is organized, armed and equipped wholly or partly at Federal expense; and

(D) is federally recognized."

Id. § 101(c)(2). The Air National Guard is defined similarly. *See id.* § 101(c) (4).

9. As a technical matter, the Army National Guard is not a component of the Army. Instead, it is the Army National Guard of the United States, which makes up one of the Army's two Reserve components. *See* 10 U.S.C. §§ 101(c)(3); *id.* § 10105 ("The Army National Guard of the United States is the reserve component of the Army that consists of—(1) federally recognized units and organizations of the Army National Guard; and (2) members of the Army National Guard who are also reserves of the Army"); *see also id.* § 10101 (listing the seven reserve components). The same is true for the Air National Guard. *See id.* § 101(c)(5) (defining the Air National Guard of the United States as a component of the Air Force); *id.* § 10111 ("The Air National Guard of the United States is the reserve component of the Air Force that consists of—(1) federally recognized units and organizations of the Air National Guard; and (2) members of the Air National Guard who are also Reserves of the Air Force"); *see also* Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994, at 35-40 (discussing the various types of status for NG members as well as the legal authorities establishing the NG's place within the broader Defense Department structure).

10. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power "[t]o call forth the Militia"); *id.* art. I, § 8, cl. 16 (giving Congress the power "[t]o provide for organizing, arming, and disciplining the Militia and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

11. *See* MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR: THE ARMY NATIONAL GUARD, 1636-2000*, at 357-60 (2003); *see also* N.Y. MIL. LAW § 6 (McKinney 2003) ("[W]henver it shall be made to appear to the governor that there is a breach of the peace, riot, resistance to process of this state or disaster or imminent danger thereof, the governor may order into the active service of the state . . . all or any part of the organized militia."); N.D. CENT. CODE § 37-01-04 (2003) (permitting the governor to call up the NG in cases of "insurrection, invasion, tumult, riot, breach of the peace, . . . or to provide assistance . . . in search and rescue efforts or to respond to a potential natural disaster or environmental hazard or nuisance").

12. *See* 32 U.S.C. § 502(a) (2000).

13. *See id.* (governing standard annual training and inactive duty (drill) training); *id.* § 502(f) (governing "training or other duty . . . in addition to that prescribed under [§502(a)]"); *see also id.* § 106 (governing annual appropriations).

14. *See supra* note 6.

15. *Bowen v. United States*, 49 Fed. Cl. 673, 676-77 (2001), *aff'd*, 292 F.3d 1383 (Fed. Cir. 2002).

16. Letter from Norman Mineta, Secretary of Transportation, to state governors, subject: National Guard Deployment at Airports (Oct. 19, 2001) (on file with the author).

17. Pub. L. No. 107-330, § 305, 116 Stat. 2820, 2826-27 (codified at 50 U.S.C. app. § 511(1) (LEXIS 2003)).

18. 50 U.S.C. app. § 511(1).

One must consider at the outset whether the law's extension will provide much actual relief. For example, a Guardsman ordered to duty to protect the airport in his hometown will probably find that his military duty has about the same effect on his ability to defend or prosecute a civil action as his civilian occupation.¹⁹ A rapid activation and deployment to an airport in another city across the state, however, would probably hold great potential to materially affect his ability to participate in the litigation. Financial benefits, such as the six-percent cap on interest rates,²⁰ would likewise assist many Guardsmen ordered to active duty under Title 32.²¹

This amendment to the SSCRA also prompts at least three other interesting questions. First, does the law apply to Active Guard and Reserve (AGR) soldiers and airmen activated under Title 32? Second, does the law broaden the existing mobilization authorities? Third, does it implicate the Posse Comitatus Act (PCA)?²²

The first of these questions concerns the law's applicability to the 36,289 authorized²³ AGR soldiers and airmen serving on

full-time National Guard duty under Title 32.²⁴ The new provision broadens the SSCRA to protect Guardsmen in a Title 32 status, but only if they are on duty for at least thirty consecutive days during a time of national emergency declared by the President. Thus, it would not apply to Title 32 AGR members. While these soldiers are on active duty for periods well in excess of thirty days, they are not on duty solely because of a national emergency. The statute's text and its legislative history both support this conclusion;²⁵ both establish that Congress clearly had airport security-type missions in mind when it wrote the law.²⁶

The new provision may be limited to certain groups of NG members, but it is broader in at least one sense. While the amendment may have been in response to the airport security mission, the new SSCRA provisions will also benefit guardsmen ordered to active duty under Title 32 because of a national emergency. It will apply to them regardless of whether their mission involves law enforcement or law enforcement-like roles. This is important because an earlier version of the proposed amendment would have limited application to situations

19. *Id.* § 521 (governing possible stays of civil proceedings). Other protections are of even less potential applicability. For example, a soldier called to active duty in his home state would be subject to the state's income and property taxation rules. The SSCRA's proscription against double taxation—taxation by a home state and the state where a service member serves on active duty—would be inapplicable. *See id.* § 574.

20. *Id.* § 526.

21. Congress's vision on this subject came from Senator Mark Dayton:

The Soldiers' and Sailors' Civil Relief Act allows America's military personnel to have their legal rights secured until they can return from the military to defend themselves. It covers such issues as rental agreements, security deposits, prepaid rent, evictions, installment contracts, credit card interest rates, mortgage interest rates, mortgage foreclosures, civil judicial proceedings, and income tax payments. One of the most widely known benefits under the act, for example, is the ability to reduce consumer debt and mortgage interest rates to six percent under certain circumstances.

148 CONG. REC. S11562 (daily ed. Nov. 19, 2002) (statement of Sen. Dayton).

22. 18 U.S.C. § 1385 (2000).

23. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 412, 116 Stat. 2458, 2527 (2002) (establishing the end strength numbers for full time active duty with the Army, Navy, Air Force, and Marine Corps Reserve, and with the Army and Air National Guard of the United States).

24. Specifically, the statute defines "Full-time National Guard duty" as

training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of . . . title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States."

32 U.S.C. § 101 (2000). Section 502 is the broadest provision of those referenced, providing that "a member of the National Guard may . . . be ordered to perform training or other duty in addition to [regularly scheduled drills and annual training]." *Id.* § 502(f). Active Guard and Reserve members of the Army and Air Force Reserve and the Active Reserve of the Navy and Marine Corps Reserve perform active duty under a similar provision. *See* 10 U.S.C. § 12301(d) (2000); *see also id.* § 101(d)(5) (defining "Full-time National Guard duty").

25. As the Veterans' Benefits Act of 2002 passed from the Senate to the House of Representatives, conference committees of the two houses of Congress crafted certain compromises. The House's explanatory statement records the following viewpoint on the language ultimately adopted:

[It] would provide that when members of the National Guard are called to active service for more than 30 consecutive days under section 502(f) of title 32, United States Code, to respond to a national emergency declared by the President, coverage under the provisions of the SSCRA would be available. The committees note that this provision is intended to extend protections of the SSCRA to members of the National Guard when called to duty under circumstances similar to those following the terrorist attacks of September 11, 2001.

148 CONG. REC. H9005-6 (daily ed. Nov. 14, 2002) (Explanatory Statement on House Amendment to Senate Bill S. 2237).

where the Guard is activated “pursuant to a call or order to duty by the Governor of a State, upon the request of a Federal law enforcement agency and with the concurrence of the Secretary of Defense, to perform full-time duty . . . for purposes of carrying out homeland security activities.”²⁷

The second question is whether this change to the SSCRA works as an implicit expansion of the Title 10 mobilization authorities,²⁸ and as a ratification of how the National Guard was used in the aftermath of 11 September 2001.²⁹ Current Title 10 mobilization authorities permit the Secretary of Defense to call up one million members of the Ready Reserve for up to twenty-four months of service “[i]n time of national emergency declared by the President.”³⁰ This constitutes political control over the number of troops that may be activated. The SSCRA amendment seems to tacitly allow the President to mobilize more troops than the other mobilization statutes authorize by requesting their activation under Title 32. Whether the strategic situation would ever require this addi-

tional flexibility for the call-up of more troops, or for longer durations, remains to be seen.

The final question concerns the PCA,³¹ which prohibits the use of federal troops as a replacement for civilian law enforcement authorities. It is at least debatable that the airport security mission violated this law. Those involved were performing a recognized “national mission.”³² The fact that the Guardsmen were still under state control, however, substantially weakens this argument. When Congress decided to drop the “law enforcement” language from the earlier version of the amendment,³³ it dropped any tacit recognition that it was creating a PCA exception.³⁴

Conclusion

For more than sixty years, the SSCRA has provided active duty service members a range of protections and benefits.

26. After passage of the Veterans’ Benefits Act of 2002, Senator Dayton made these comments:

Following the terrorist attacks against the United States on September 11, 2001, members of the Minnesota National Guard were activated by our State at the request of the President to provide security at several major airports. As the duration of these activations grew to several months, I began to hear from these brave men and women about the stress and financial burdens that accompanied their service. Senator Wellstone and I were shocked to learn that although the Soldiers’ and Sailors’ Civil Relief Act exists to ease many of these same burdens for active-duty service members and reservists, members of the National Guard were not similarly covered for these types of activations, because this service was deemed to be State, rather than Federal service.

148 CONG. REC. S11562 (daily ed. Nov. 19, 2002) (statement of Sen. Dayton). The amendment’s sponsors explained the problem as follows:

The Soldiers’ and Sailors’ Civil Relief Act of 1940 suspends enforcement of certain civil liabilities and provides certain rights and legal protections to Servicemembers who have been called up to active duty under title 10, United States Code. However, these protections do not extend to National Guard members called to duty under section 502(f) of title 32, United States Code, “to perform training or other duty.” Certain homeland security duties performed under title 32, United States Code such as protecting the nation’s airports, have been carried out at the request and expense of the Federal government with National Guard members under the command of their state governors.

148 CONG. REC. H9005 (daily ed. Nov. 14, 2002) (Explanatory Statement on House Amendment to Senate Bill S. 2237) (quoting 32 U.S.C. § 502(f)).

27. See Veterans’ Benefits Improvement Act of 2002, S. 2237, 107th Cong. § 401 (2002); 148 CONG. REC. S9554 (daily ed. Sept. 26, 2002).

28. See 10 U.S.C. §§ 12301(a), 12302, 12304 (2000).

29. In support of the legislation, Senator Jay Rockefeller said the following:

In the days following September 11, 2001, under the direction of the President, the Federal Aviation Administration and the Secretary of Defense coordinated the use of National Guard members at commercial airports. These National Guard members, called to active duty from four to six months, clearly served a national mission. However, because they were called up under title 32, they were not entitled to SSCRA protections.

148 CONG. REC. S11334 (daily ed. Nov. 18, 2002) (statement of Sen. Rockefeller).

30. 10 U.S.C. § 12302.

31. 18 U.S.C. § 1385 (2000). A complete examination of the PCA is beyond the scope of this note. See generally INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 323-50 (2003).

32. See *supra* note 29.

33. See *supra* note 27 and accompanying text.

34. As previously noted, future missions for the NG may be similar to the airport security mission, but not this is not necessarily the case. The SSCRA applies to NG members when they are on Title 32 duty during national emergencies for thirty or more consecutive days, regardless of the mission. See 50 U.S.C. app. § 511(1) (LEXIS 2003).

Recent changes extend its protections to members of the National Guard when they serve the nation in a Title 32 status during national emergencies for periods greater than thirty days. In some ways, this is a small measure of thanks for their sacrifice and service. Practitioners advising clients from the

National Guard must understand when their clients are covered. They must also recognize a renewed sense of congressional interest in the SSCRA and be mindful that additional changes are pending.³⁵ Lieutenant Colonel JT. Parker.

35. One proposal during the 107th Congress would have made remarkably broad changes to the SSCRA. *See* H.R. 5111, 107th Cong. (2002). This measure did not receive much initial attention, but was reintroduced early during the 108th Congress. *See* H.R. 100, 108th Cong. (2003). This proposal would modernize the SSCRA's language, and would define or otherwise expand many benefits. *Id.*